Joanne Sim Lean Khim v Agensi Pekerjaan Ng Bersatu Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-16–34–10 OF 2020
WAN AHMAD FARID J
3 OCTOBER 2021

Labour Law — Employment — Contract of service — Non-payment of salaries — Whether employer to pay arrears due — Claim for the balance of unpaid salary — Order by assistant director of labour for employer to pay the claim for commission — Whether the appellant waived her right — Unjust enrichment — Whether the appellant could be said to be unjustly enriched in insisting that the arrears in her salaries ought to be paid by the respondent

This was an appeal against the decision of the Assistant Director of Labour, Subang Jaya, on 7 September 2020, who dismissed the claim for the balance of the appellant's salary but allowed the claim for commission for the sum of RM9,070. The respondent was in the business of sourcing and supplying domestic maids. The appellant started her employment with the respondent company in 2016. By the letter dated 15 March 2016 ('the first letter of appointment'), the appellant was appointed as the sales and marketing executive with a probation salary of RM2,000. The appellant was also to be paid a commission based on the sales, ie, the number of cases that she could secure for the respondent. In her evidence at the labour court, the appellant testified that her scope of work was to find customers who need the services of domestic maids, secure a contract with them, send the maids to the respective customers, collect payment from the customers and make arrangements for the renewal of the work permits of the said maids. On 15 June 2016, the appellant was confirmed in her job ('the letter of confirmation'). Upon the said confirmation, the appellant's basic salary was increased to RM2,200. On 15 December 2017, both parties executed a contract of appointment ('contract of appointment') confirming the 'first tier sales salary'of the appellant for RM2,200. Subsequently, by a letter dated 20 December 2018 ('exh E1'), the appellant's basic salary was increased to RM2,400. However, from January 2018, the basic salary of the appellant, which was RM2,400, was deducted from the commission that the appellant was entitled through her monthly sales. The appellant also alleged her commissions for the sales she closed in December 2019, February, March, May and June 2020. At the labour court, the appellant's claim against the respondent was for a sum of RM67,550 being the balance of unpaid salaries and commissions in 2018, 2019 and 2020. At the time of filing her claim, the appellant was no longer an employee of the respondent, having tendered her resignation by giving a one month notice on

18 February 2020. In the circumstances according to the learned ADL, the Employment Act does not apply to the appellant. Instead, in the determination of the dispute, the labour court had relied on the contract of employment between the parties. In any event, the learned ADL in her finding held that the appellant had every opportunity to challenge the alleged non payment of her salary when she was in the respondent's employment. The fact that there was no evidence of this means that — according to the learned ADL — the appellant had condoned the non-payment of her basic salary for the relevant period. On the issue of the unpaid commissions, the learned ADL, in her grounds of judgment, held that such payments could only be made upon verification from the respondent's account manager. It was the finding of the learned ADL that the verified claim in respect of the unpaid commissions was only RM9,070.

Held:

(1) The court was of the view that the finding by the learned ADL was misplaced. The court was of the view that the document in exh E1 should not be read in isolation with other contemporaneous documents relating to the employment of the appellant. In short, the first letter of appointment, the letter of confirmation, the contract of employment and the document in exh E1 must be read together in order to ascertain the intention of the parties. Until and unless the previous terms were varied with consensus ad idem, they shall remain enforceable. With respect, the learned ADL had erred in concluding that the letter in exh E1 should have been read in isolation from other documents. This called for appellate intervention (see paras 19–20 & 24–25).

(2) The court did not accept the argument that the failure to insist on the salary means that appellant had waived her rights. That cannot be the position in law. The salary was the appellant's contractual right according to the first letter of appointment and other subsequent documents. There was no other contemporary document adduced at the hearing to suggest that she had waived this right. All the documents that govern the relationship between the parties were in writing. It was the court's considered view that any form of the waiver on the part of the appellant must also be writing and unequivocal (see paras 27–28).

(3) The court was of the view that the appellant could not be said to be unjustly enriched in insisting that the arrears in her salaries ought to be paid by the respondent. The appellant did not ask for more than RM2,400 per month that she was entitled to under the contract of employment. On this ground alone, the claim for unjust enrichment must fail (see para 29).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Penolong Pengarah Tenaga Kerja, Subang Jaya, pada 7 September 2020, yang menolak tuntutan baki gaji perayu tetapi membenarkan tuntutan komisen berjumlah RM9,070. Responden menjalankan perniagaan mencari dan membekalkan pembantu rumah. Perayu memulakan pekerjaannya dengan syarikat responden pada 2016. Melalui surat bertarikh 15 Mac 2016 ('surat pelantikan pertama'), perayu telah dilantik sebagai eksekutif jualan dan pemasaran dengan gaji tempoh percubaan sebanyak RM2,000. Perayu juga akan dibayar komisen berdasarkan jualan, iaitu, bilangan kes yang beliau boleh dapatkan untuk responden. Dalam keterangannya di mahkamah buruh, perayu memberi keterangan bahawa skop kerjanya adalah mencari pelanggan yang memerlukan khidmat pembantu rumah, memasukki kontrak dengan mereka, menghantar pembantu rumah kepada pelanggan masing-masing, mengutip bayaran daripada pelanggan dan menguruskan untuk pembaharuan permit kerja pembantu rumah tersebut. Pada 15 Jun 2016, perayu telah disahkan tugasnya ('surat pengesahan'). Selepas pengesahan tersebut, gaji pokok perayu dinaikkan kepada RM2,200. Pada 15 Disember 2017, kedua-dua pihak telah menandatangani kontrak pelantikan ('kontrak pelantikan') yang mengesahkan 'gaji jualan peringkat pertama' perayu sebanyak RM2,200. Seterusnya, melalui surat bertarikh 20 Disember 2018 ('lampiran E1'), gaji pokok perayu dinaikkan kepada RM2,400. Walaubagaimanapun, mulai Januari 2018, gaji pokok perayu, iaitu RM2,400, telah dipotong daripada komisen yang layak diterima oleh perayu melalui jualan bulanannya. Perayu juga mendakwa komisennya untuk jualan yang dimuktamadkan belaiu pada Disember 2019, Februari, Mac, Mei dan Jun 2020. Di mahkamah buruh, tuntutan perayu terhadap responden adalah sebanyak RM67,550 sebagai baki gaji yang belum dibayar dan komisen pada tahun 2018, 2019 dan 2020. Pada masa pemfailan tuntutannya, perayu bukan lagi pekerja responden, telah mengemukakan peletakan jawatannya dengan memberikan notis sebulan pada 18 Februari 2020. Dalam keadaan berdasarkan PPTK yang bijaksana, Akta Pekerjaan tidak terpakai kepada perayu. Sebaliknya, dalam menentukan pertikaian tersebut, mahkamah buruh telah bergantung kepada kontrak pekerjaan antara pihak-pihak. Dalam apa jua keadaan, PPTK yang bijaksana dalam dapatannya memutuskan bahawa perayu mempunyai setiap peluang untuk mencabar dakwaan gajinya tidak dibayar semasa beliau bekerja dengan responden. Fakta bahawa tiada keterangan tentang ini bermakna bahawa — menurut PPTK yang bijaksana — perayu telah membenarkan gaji pokoknya tidak dibayar untuk tempoh yang berkaitan. Mengenai isu komisen yang tidak dibayar, PPTK yang bijaksana, dalam alasan penghakimannya, memutuskan bahawa pembayaran sedemikian hanya boleh dibuat selepas pengesahan daripada pengurus akaun responden. Ia adalah dapatan PPTK yang bijaksana bahawa tuntutan yang disahkan berhubung dengan komisen yang belum dibayar adalah hanya RM9,070.

Diputuskan:

(1) Mahkamah berpandangan bahawa dapatan oleh PPTK yang bijaksana adalah salah arah. Mahkamah berpandangan bahawa dokumen dalam lampiran E1 tidak seharusnya dibaca secara berasingan dengan dokumen selari lain yang berkaitan dengan pekerjaan perayu. Pendek kata, surat pelantikan pertama, surat pengesahan, kontrak pekerjaan dan dokumen dalam lampiran E1 hendaklah dibaca bersama-sama untuk memastikan niat pihak-pihak. Sehingga dan melainkan syarat-syarat sebelumnya diubah dengan persetujuan ad idem, syarat-syarat tersebut tetap boleh dikuatkuasakan. Dengan itu, PPTK yang bijaksana telah terkhilaf dalam membuat kesimpulan bahawa surat dalam lampiran E1 sepatutnya dibaca secara berasingan daripada dokumen lain. Ini memerlukan campur tangan rayuan (lihat perenggan 19–20 & 24–25).

(2) Mahkamah tidak menerima pendapat bahawa kegagalan untuk menuntut gaji bermakna perayu telah mengetepikan haknya. Ianya tidak boleh menjadi kedudukan dalam undang-undang. Gaji adalah hak kontrak perayu mengikut surat pelantikan pertama dan dokumen lain yang seterusnya. Tidak ada dokumen selari lain yang dikemukakan semasa perbicaraan untuk mencadangkan bahawa beliau telah mengetepikan hak ini. Kesemua dokumen yang mengawal hubungan antara pihak adalah secara bertulis. Ia adalah menjadi pandangan mahkamah bahawa sebarang bentuk pelepasan hak di pihak perayu juga mestilah bertulis dan nyata (lihat perenggan 27–28).

(3) Mahkamah berpandangan bahawa perayu tidak boleh dikatakan diperkaya secara tidak adil dengan menegaskan bahawa tunggakan gajinya perlu dibayar oleh responden. Perayu tidak meminta lebih daripada RM2,400 sebulan yang beliau berhak di bawah kontrak pekerjaan. Atas alasan ini sahaja, tuntutan untuk pengayaan yang tidak adil harus gagal (lihat perenggan 29).]

Cases referred to

Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor [2013] 7 MLJ 437, HC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165 (refd)

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324, CA (refd)

Legislation referred to

Employment Act 1955 ss 69B, 69B(1)

Loh Cien Zen Zen (Chyuan & Co) for the appellant.

Chang Kah Ling (Chang & Partners) for the respondent.

Wan Ahmad Farid J:

[1] This is an appeal against the decision of the Assistant Director of Labour, Subang Jaya, dated 7 September 2020, who dismissed the claim for the balance of the appellant's salary but allowed the claim for commission for the sum of RM9,070.

THE BRIEF FACTS

[2] The respondent is in the business of sourcing and supplying domestic maids. The appellant started her employment with the respondent company in 2016. By the letter dated 15 March 2016 ('the first letter of appointment'), the appellant was appointed as the sales and marketing executive with a probation salary of RM2,000. The appellant was also to be paid a commission based on the sales, ie, the number of cases that she could secure for the respondent.

[3] In her evidence at the labour court, the appellant testified that her scope of work was to find customers who need the services of domestic maids, secure a contract with them, send the maids to the respective customers, collect payment from the customers and make arrangements for the renewal of the work permits of the said maids.

[4] On 15 June 2016, the appellant was confirmed in her job ('the letter of confirmation'). The letter of confirmation, which was dated on the same day, reads, inter alia, as follows:

> After careful evaluation of your performance this is to inform you that with effect from 15th June 2016, you have been moved to Confirmation with our agency. You will now be Sales Executive and will report to Ng Jing Hao as the Sales Director.

Upon the said confirmation, the appellant's basic salary was increased to RM2,200. On 15 December 2017, both parties executed a contract of appointment ('contract of appointment') confirming the 'first tier sales salary' of the appellant for RM2,200.

[5] Subsequently, by a letter dated 20 December 2018 (exh E1), the appellant's basic salary was increased to RM2,400.

[6] However, from January 2018, the basic salary of the appellant, which was RM2,400, was deducted from the commission that the appellant was entitled through her monthly sales. The appellant also alleged her commissions for the sales she closed in December 2019, February, March, May and June 2020.

[7] At the labour court, the appellant's claim against the respondent was for a sum of RM67,550 being the balance of unpaid salaries and commissions in 2018, 2019 and 2020. Particulars of the claim are as follows:

(a) unpaid salaries for 2018 – RM22,000;

(b) unpaid salaries for 2019 – RM28,800;

(c) unpaid commission for December 2019 – RM1,050;

(d) unpaid commission for February 2020 – RM9,910;

(e) unpaid commission for March 2020 – RM4,770; and

(f) unpaid commission for May and June 2020 – RM1,020.

AT THE LABOUR COURT

[8] At the time of filing her claim, the appellant was no longer an employee of the respondent, having tendered her resignation by giving a one month notice on 18 february 2020.

[9] After having heard the evidence, the learned Assistant Director of Labour ('ADL') concluded that the appellant was an employee under s 69B of the Employment Act 1955. Section 69B(1) provides that:

> Notwithstanding the provisions of this Act, the powers of the Director General under paragraph 69(1)(a) shall extend to employees whose wages per month exceed two thousand ringgit but does not exceed five thousand ringgit.

In the circumstances according to the learned ADL, the Employment Act does not apply to the appellant. Instead, in the determination of the dispute, the labour court had relied on the contract of employment between the parties.

[10] The learned ADL then referred to the letter in exh E1, which according to him, should be read to mean that the appellant is only entitled to the basic salary if she secured one to three cases only. There is nothing in the said letter, according to the learned ADL, that entitles the appellant to a basic salary if she secures more than three cases.

[11] In any event, the learned ADL in her finding held that the appellant had every opportunity to challenge the alleged non payment of her salary when she was in the respondent's employment. The fact that there was no evidence of this means that — according to the learned ADL — the appellant had condoned the non payment of her basic salary for the relevant period.

[12] On the issue of the unpaid commissions, the learned ADL, in her grounds of judgment, held that such payments could only be made upon

verification from the respondent's account manager. It was the finding of the learned ADL that the verified claim in respect of the unpaid commissions was only RM9,070.

AT THE HIGH COURT

[13] At the High Court, learned counsel for the respondent did not deny that the respondent did not pay the appellant's salary in 2018 and 2019. However, and in support of the decision of the learned ADL, learned counsel for the respondent argued that the appellant did not object during the material time.

[14] The claim for the unpaid salaries only arose after the appellant resigned from the respondent company.

[15] Therefore, it is the contention of learned counsel for the respondent that allowing the claim under this head at this stage would be tantamount to unjust enrichment. During the oral submission before me, learned counsel for the respondent argued that the appellant should have informed the respondent company in 2018 and should not have waited for two years.

ANALYSIS: ON THE UNPAID SALARIES

[16] I respectfully agree with the learned ADL that since the appellant's salary exceeds RM2,000, her rights if at all, are governed by the terms of the contract of service between the parties as provided for under s 69B of the Employment Act.

[17] What then are the terms of the contract of service between the appellant and the respondent?

[18] The learned ADL seemed to be preoccupied with the letter in exh E1. But with respect, exh E1 specifically stated that the salary increment of the appellant was RM2,400 per month. It did not indicate that the appellant's salary would be replaced in lieu of the proposed commission rate. It says, inter alia:

1 to 3 case: RM350.00 + basic salary

4 to 7 case: RM1050.00

8 case: RM1200

The learned ADL was of the view that the appellant was only entitled to the basic salary of RM2,400 if her sales were only between one to three cases:

A Dalam terma ini tiada yang menyatakan Pengadu layak kepada gaji pokok kecuali mempunyai 1–3 kes.

[19] With respect, I think the aforesaid finding is misplaced. Surely the appellant could not be expected only to earn the monthly commission of B RM1,050, which was less than her basic salary if she secured between four to seven cases in one particular month. If we go by that logic, it is better for the appellant to secure one case a month since she would get her basic salary of RM2,400. This could not have been the intention of the parties.

C

[20] In my view, the document in exh E1 should not be read in isolation with other contemporaneous documents relating to the employment of the appellant. In short, the first letter of appointment, the letter of confirmation, the contract of employment and the document in exh E1 must be read together D in order to ascertain the intention of the parties.

[21] The law, I believe, can be found in the case *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324. In that case, the first four documents were executed on E an even date but the three other agreements were executed on different dates. In delivering the judgment of the Court of Appeal, Gopal Sri Ram JCA (later FCJ) quoted the judgment of Raja Azlan Shah J (as the former LP then was) in *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165:

F It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one (see *Manks v Whiteley* [1912] 1 Ch 735).

[22] What would then be the effect of reading together the first letter of G appointment, the letter of confirmation, the contract of employment and the document in exh E1? There is nothing in exh E1 that says that the appellant's salary would be replaced completely by a new scheme of things — in the form of commissions based on the sales or cases secured by the plaintiff.

H **[23]** In particular, the letter in exh E1 does not alter the term in the letter of confirmation dated 15 June 2016. The letter of confirmation reads, inter alia, as follows:

I The terms and conditions of your employment will remain the same as on (sic) the Offer Letter earlier except for the notice period. Your basic salary from now is RM2,200.

If indeed the parties intended to remove the salary clause in the previous documents, it would have been reflected in no uncertain terms in the letter in exh E1.

[24] Until and unless the previous terms were varied with *consensus ad idem*, they shall remain enforceable. A

[25] With respect, the learned ADL had erred in concluding that the letter in exh E1 should have been read in isolation from other documents. This calls for appellate intervention. B

[26] Learned counsel for the respondent argued that the appellant should not have waited for two years before filing her claim at the labour department. If that is the respondent's position, it should have confronted the appellant at the hearing at the court below. I have gone through the notes of evidence from the record of appeal, and the respondent did not cross-examine the appellant on this issue. C

[27] In any event, I do not accept the argument that the failure to insist on her salary means that she had waived her rights. That cannot be the position in law. The salary is her contractual right according to the first letter of appointment and other subsequent documents. There is no other contemporary document adduced at the hearing to suggest that she had waived this right. D E

[28] All the documents that govern the relationship between the parties are in writing. It is my considered view that any form of the waiver on the part of the appellant must also be writing and unequivocal. A mere delay in the assertion of the appellant's right does not constitute a waiver: see *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437. F

[29] On the issue of unjust enrichment, the claim is a cause of action in itself separate from an action in contract or tort. Before the cause of action based on unjust enrichment can be established, the respondent has to show that: G

(a) the appellant must have been enriched;

(b) the enrichment must be gained at the respondent's expense; H

(c) that the retention of the benefit by the appellant was unjust; and

(d) there must be no defence available to extinguish or reduce the appellant's liability to make restitution. I

The above four conditions were stated by Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441.

[30] Applying the law to the facts of the appeal, I do not with respect think that the appellant could be said to be unjustly enriched in insisting that the arrears in her salaries ought to be paid by the respondent. She did not ask for more than RM2,400 per month that she was entitled to under the contract of employment. On this ground alone, the claim for unjust enrichment must fail.

ON THE UNPAID COMMISSIONS

[31] On the issue of unpaid commissions, I have gone through the record of appeal and am in complete agreement with the learned ADL in her findings.

[32] The learned ADL had made a factual finding that was based on the verified claim, which I do not intend to interfere with.

FINDINGS

[33] For the reasons aforesaid, this appeal is partly allowed.

[34] The order of the learned ADL in respect of unpaid salaries in 2018 and 2019 is hereby reversed and substituted with an order for the respondent to pay the appellant a sum of RM50,800.

[35] As to the unpaid commissions, the order of the learned ADL is affirmed.

[36] Costs is fixed at RM5,000 subject to allocatur.

Appeal partly allowed.

Reported by Nuzul Fitrie